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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 01-135
Table of Allotments	)	RM-10154
FM Broadcast Stations	)	
(Caliente, Nevada)	)	

To: Assistant Chief, Audio Division
Media Bureau

SUPPLEMENT

Marathon Media Group, LLC ("Marathon"), by its counsel, hereby submits a supplement in the above-captioned proceeding. The purpose of the supplement is to discuss the relevance of a recent decision of the Commission on this case.

On August 13, 2001, Marathon filed a counterproposal in this proceeding, seeking to relocate Station KONY from Channel 266C at Kanab, Utah to Channel 265C at Moapa, Nevada. To avoid depriving Kanab of its only local service, Marathon proposed the allotment of Channel 270C2 as a replacement channel at Kanab, and expressed an interest in applying for and constructing a station on the new channel at Kanab, in compliance with the Commission's rules and policies. *See Llano and Marble Falls, Texas,* 11 FCC Rcd 12647 (1996), *recon. denied,* **13** FCC Rcd 25039 (1998). Marathon's counterproposal was accepted and placed on **a** Public Notice soliciting reply comments. *See* Report No. 2506 (rel. Oct. 5, 2001), *corrected* (rel. Oct. 23,2001).

On February 11, 2003, the Commission issued a decision in *Application of Pacific Broadcasting of Missouri LLC for Special Temporary Authorization to Operate Station KTKY(FM), Refugio, Texas ("Refugio").*[1] In the *Refugio* decision, the Commission directed the

[1] *Memorandum Opinion and Order,* FCC 03-18 (rel. Feb. 11,2003).

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staff to cease the practice of relying on vacant "backfill" allotments to preserve local service. If the *Refugio* rule were applied to the pending proposals in this proceeding, it would render Marathon's counterproposal defective and possibly allow the grant of a mutually exclusive proposal which would foreclose the ability of Marathon to file a rule making proposal in the future without a "backfill" allotment. However, the *Refugio* rule cannot be applied to this proceeding, for two reasons. First, doing so would violate the Administrative Procedure Act. It would impose a rule of general applicability – one which reverses longstanding and well-settled law – upon the public without giving public notice of the proposed rule and an opportunity to comment on it. Second, even if the promulgation of the *Refugio* rule were somehow within the Commission's power, the application of the rule to pending rule making proposals filed in reliance on previous rules would give the rule an impermissible retroactive effect.

I. The "No-Backfill" Rule Violates the Administrative Procedure Act Since it Was Not Preceded by Notice and an Opportunity to Comment.

1. In order to grant a station a change in community of license, the Commission requires, *inter alia*, that the original community retain local service. *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted* in part, 5 FCC Rcd 7094 (1990). For many years, the Commission has accepted and granted petitions and counterproposals in FM and **TV** allotment proceedings in which this requirement is met through the addition of a new allotment, in compliance with applicable spacing rules, at the original community.' The rule the Commission announced in *Refugio* – *i.e.*, the prohibition on proposing a vacant "backfill" allotment to avoid depriving a community of its sole local service – is a reversal of this longstanding practice. It is a rule of general applicability, potentially

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[2] *Rangely, Silverton and Ridgway, Colorado*, 15 FCC Rcd 18266 (2000); *Refugio and Taft, Texas*, 15 FCC Rcd 8497 (2000); *Llano and Marble Falls, Texas*, **12** FCC Rcd 6809 (1997), *recon. denied*, 13 FCC Rcd 25039 (1998); *Albion, Lincoln and Columbus, Nebraska*, 8 FCC Rcd 2876 (1993), *affd*, 10 FCC Rcd 11931 (1995), *rev. denied sub nom. Busse Broadcasting Corp.* v. *FCC*, 87 F3d 1456 (D.C. Cir 1996).

affecting the viability of numerous petitions already on file under the previous rule, as well as future proposals to amend the Table of Allotments. However, it was announced in the context of a licensing decision – specifically, a request for special temporary authority – and not in **a** notice and comment rule making proceeding. Notably, it is not even applicable to the licensee in that decision, since the earlier rule making was processed and granted with a vacant backfill allotment under the previous rule. *See Refugio and Taft, Texas,* 15 FCC Rcd 8497 (2000).

2. While the Commission generally is free to use agency adjudicatory processes, including licensing processes, to promulgate new rules,[3] there are circumstances in this instance that dictate the use of rule making procedures. First, the new "no backfill" rule modifies a rule that the Commission adopted by notice and comment rule making, and agencies are not free to modify rules promulgated in that manner without invoking rule making procedures. *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999). The reason for this rule **is** that an agency could use such a process to circumvent the notice and comment procedures mandated by the APA. *See Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579 (D.C. Cir. 1997). *See also Alaska Professional Hunters Ass'n v. FAA,* 177 F.3d 1030, 1035 (D.C. Cir 1999) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself; through the process of notice and comment rulemaking.").

3. The former rule governing the use of new allotments as "backfills" to avoid the loss of a community's only local service was developed over the course of numerous notice-and-comment rule making proceedings, and has been ratified by the Commission and the Court. For example, when the Commission issued a Notice of Proposed Rule Making proposing to reallot TV Channel 8 from Albion, Nebraska to either Lincoln or Columbus, Nebraska, it also proposed

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[3] ***See*** *SEC* ***v.*** *Chenery Corp.*, 332 U.S. 194,202-203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency").

the new allotment of Channel 18 to Albion to avoid depriving that community of its sole local transmission service. *Albion, Lincoln and Columbus, Nebraska,* 6 FCC Rcd 6038 (1991). The reallotment to Lincoln with the backfill at Albion was subsequently granted and affirmed by the Commission as well as the Court of Appeals. 8 FCC Rcd 2876 (1993), *aff'd*, 10 FCC Rcd 11931 (1995), *rev. denied sub nom. Busse Broadcasting Corp. v. **FCC,*** 87 F3d 1456 (D.C. Cir 1996). Similarly, when the Commission proposed to delete FM Channel 284C3 at Llano, Texas, and allot Channel 285C3 at Marble Falls, Texas, it also proposed to allot new Channel 242A at Llano to avoid depriving that community of its sole local transmission service. *Llano and Marble Falls, Texas,* 11 FCC Rcd 12647 (1996) The reallotment to Marble Falls with the backfill at Llano was subsequently granted. 12 FCC Rcd 6809 (1997), *recon. denied,* 13 FCC Rcd 25039 (1998). The Commission has cited these two cases as precedent in other backfill allotment situations.[4]

4. Since the Commission developed the pre-*Refugio* backfill **rule** using rule making procedures, it cannot simply reverse that rule unless it uses similar rule making procedures to do so. It simply is not open to an agency to undo its duly promulgated rules without notice to the public that it is considering changing its position, and an opportunity to comment, **as** mandated by the APA.

5. Even if the Commission were writing on a clean slate, however (which it is not), its choice to announce a blanket rule in the context of a licensing proceeding is not unfettered. The Supreme Court has stated that "there may be situations where [an agency's] reliance on adjudication would amount to an abuse of discretion . . ." *NLRB v. Bell Aerospace Co.*, 416 **U.S.** 267, 294 (1974). In that case, the Court concluded that because a general standard was not capable of being framed, there was no abuse of discretion in proceeding by a series of

[4] *See, e.g.,* cases cited in footnote 2, *supra.*

individualized determinations. ***Id.*** In this case, however, the Commission ***has*** framed a general standard, and has *no* need to proceed by individualized determinations. Announcing this standard in a licensing decision ***could*** amount to an abuse of discretion as the Supreme Court suggested.

II. Even if Validly Promulgated, The Rule Should Not be Applied Retroactively to Proposals On File Before the Rule Became Effective.

6. The Commission has the discretion to impose a new general rule in the context of a licensing decision that does not involve an FM or TV allotment rule making, as it has purported to do in the ***Refugio*** order. ***See SEC v. Chenery Corp.,*** 332 **U.S.** 194 (1947). The Commission even has the discretion to reverse existing law in the context of a licensing decision, and apply the new law to the parties before it. ***See Retail, Wholesale and Department Store*** *Union* ***v. NLRB,*** 466 F.2d 380, 390 (D.C. Cir. 1972). However, it does not ordinarily have the ability to use that process to reverse existing law ***and apply the new law retroactively*** to pending cases of other parties. ***See NLRB v. Majestic Weaving*** Co., 355 F.2d 854, 860 (2d Cir. 1966) (noting that the application by an agency of a new rule to penalize past conduct that was permissible at the time the party acted "raises judicial hackles."); ***Retail, Wholesale and Department Store*** *Union,* ***supra.*** "Indeed, courts have long hesitated to permit retroactive rule making and have noted its troubling nature. When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief." *Yakima* ***Valley Cablevision*** v. *FCC,* 794 F.2d 737, 745 (D.C. Cir. 1986).

7. In ***Retail, Wholesale and Department Store Union,*** the court identified a number of considerations bearing on the question of when a new adjudicatory decision can be applied retroactively: (1) whether the case is one of first impression; **(2)** whether the new rule is an "abrupt departure from well established practice"; (3) the extent of parties' reliance on the old rule; **(4)** the burden imposed by retroactive application; and (5) the agency's interest in

retroactive application. 466 F.2d at 390. These factors clearly militate against retroactive application of the ***Refugio*** rule to parties who filed rule making proposals under the previous rule.

8. First, ***Refugio*** is not a case of first impression. The Commission has faced the problems associated with "backfill" allotments in previous cases. ***See Citadel Communications*** Co., ***Ltd.,*** 10 FCC Rcd 11910 (1995) (granting rule waivers associated with implementation of ***Albion, Lincoln, and*** *Columbus,* ***Nebraska, supra).*** Cases of second or third impression do not present nearly as compelling a case for retroactive application as cases of first impression. ***Retail, Wholesale and Department Store Union,*** 466 F.2d at 390. Second, the ***Refugio*** rule is a reversal of existing law. **An** agency reversing existing law does not have the same discretion in the application of that law as an agency merely clarifying uncertain law. ***See Verizon Telephone*** Cos. *v. FCC,* 269 F.3d 1098, 1109 (D.C. Cir. 2001) (strong presumption against retroactivity when there is a "substitution of new law for old law that was reasonably clear"). Third, parties have placed great reliance on the old rule. They have incurred legal and engineering expenses in preparation of rule making proposals, and have placed potential plans for their stations on hold while their rule making proposals have remained pending – in Marathon's case close to two years. Indeed, the Commission itself relied on the old rule, accepting Marathon's Counterproposal, placing it on Public Notice and requesting comments. Fourth, application of the new rule would impose a burden on parties who face dismissal of their pending proposals, and for whom irrevocable changes to the spectrum may preclude development of a proposal that complies with the new rule. The burden would fall particularly heavily on counterproponents, who do not have the ability to refile in compliance with the new rule. Fifth, the Commission has little to gain from retroactive application because it has been operating under the old rule for many years and faces no regulatory or statutory deadline to make the change. In addition, the number of parties affected by retroactive application is few and finite; as a result of the ***Refugio***

decision there will be no more proposed allotment backfills. The Commission even failed to consider whether the new rule should be applied retroactively, given that there was no discussion of the subject in the ***Memorandum Opinion and Order,*** and this failure further argues against its retroactive application. Applying the new policy retroactively when the decision did not even discuss the question of retroactivity would be unfair and inequitable to parties such as Marathon.

9. **A** Commission decision to impose the ***Refugio*** rule retroactively also would be inconsistent with past practice in the allocations rule making area. Whenever the Commission has announced rule changes in FM/TV allotment cases, previously it has done so prospectively. ***See e.g.***, ***Chattahoochee, Florida and Headland, Alabama*** 10 FCC Rcd 10352, **10354** (1995) ("we will henceforth require stations seeking to move from rural communities to suburban communities located outside but proximate to Urbanized Areas to make the same showing..."); ***Window, Arizona, et al.***, 16 FCC Rcd 9551 at ¶ 9 (2001) ("we take this opportunity to advise that effective upon publication of this *MO&O* in the Federal Register, we will no longer entertain optional or alternative proposals presented in either an initial petition for rule making or in a counterproposal"); *Taccoa,* ***Georgia, et al.,*** 16 FCC Rcd 21191 at ¶ **5 (2001)** ("to address these concerns, we intend to carefully review future counterproposals filed by the original rule making proponent"). None of these examples were applied retroactively to pending cases on file at the time of the decision. Similarly, the Commission must not apply the ***Refugio*** rule retroactively against Marathon, a party that filed its counterproposal in reliance **upon** the Commission's then existing policy.

WHEREFORE, for the foregoing reasons, the Commission should process Marathon's counterproposal in this proceeding under the **rules** in effect when it was filed, and permit a new vacant allotment (or an unbuilt construction permit) to serve to prevent the **loss** of a community's only service in connection with a change of community of license.

Respectfully submitted,

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April 1,2003

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 1st day of April, 2003, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **"Supplement"** to the following:

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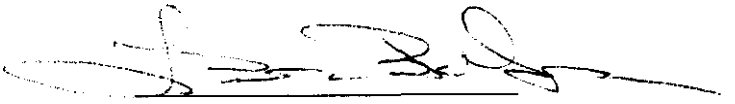

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